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No. 88-182

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

GENERAL ELECTRIC COMPANY,
v. *Petitioner,*
UNITED STATES OF AMERICA
and
JOHN M. GRAVITT,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY MEMORANDUM OF PETITIONER
GENERAL ELECTRIC COMPANY

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REPLY MEMORANDUM OF PETITIONER
GENERAL ELECTRIC COMPANY

1. *The United States Agrees That This Case Presents an Important and Unsettled Question.*

The United States agrees with petitioner General Electric Company ("GE") that this case properly frames the issue left open in *Carson v. American Brands, Inc.*, 450 U.S. 79, 83 n.7 (1981), that the court below erred in concluding that no appeal lies from the rejection of a settlement, and that the issue is of continuing importance. Memorandum for the United States ("U.S. Mem.") at 2. The Solicitor General has advised the Court that appeal under 28 U.S.C. § 1291 of an order rejecting a set-

tlement is particularly important where, as in this case, the appeal questions the statutory and constitutional authority of the district court to interfere with the exercise of a law enforcement determination committed by Article II of the United States Constitution to the Executive Branch. U.S. Mem. at 7-9.

Where a district court improperly substitutes its judgment for that of the officials responsible for the conduct of the litigation, a serious intrusion into Executive Branch responsibilities will be irrevocable unless some avenue exists for effective review.

U.S. Mem. at 9. These questions will not be reviewable after trial.

The Solicitor General has explained that he did not file a separate petition for certiorari primarily because the existence of a circuit conflict on the question of the appealability under § 1291 of an order rejecting a settlement is not clear. U.S. Mem. at 10. At the same time, the Solicitor General acknowledges that the question presented "is a matter of considerable uncertainty" that "has received conflicting answers in the past" from the courts of appeals. U.S. Mem. at 4, 6.

The government's memorandum observes that the conflict among the circuits on the § 1291 question that this Court had identified in *Carson*, 450 U.S. at 82-83, has been "dissipated somewhat" by the Ninth Circuit's subsequent decision in *EEOC v. Pan American World Airways, Inc.*, 796 F.2d 314, 318 n.7 (9th Cir. 1986), cert. denied, 107 S. Ct. 874 (1987). U.S. Mem. at 6. But the government also notes that in changing course the Ninth Circuit actually misread *Carson*. U.S. Mem. at 6. The clear conflict that existed prior to the *Pan American* decision has thus been obscured only by the erroneous determination in *Pan American*, followed by the court below, that *Carson* implicitly precluded appeal of orders preventing settlements under § 1291 (*Pan American*, 796

F.2d 314, 318 n.7), despite this Court's express reservation of the issue (450 U.S. at 83 n.7). The erroneous *Pan American* decision, accordingly, has not diminished but rather has intensified the need for guidance from the Court on this issue.

2. *The United States Agrees That the Standards for Appeal Under 28 U.S.C. § 1291 Are Satisfied in This Case.*

The United States agrees that the district court's order rejecting the settlement meets the criteria established by this Court for identifying an appealable collateral order:

[T]he order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.

Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (footnote omitted). See *Van Cauwenberghe v. Biard*, 108 S. Ct. 1945, 1949 (1988).

Gravitt asserts that the order rejecting the settlement is not conclusive, because "the parties are free to return to the bargaining table" after "meaningful" civil discovery, which he contends to be necessary for the United States to assess this case adequately. Gravitt's Brief In Opposition ("Gravitt") at 16-17. But, as the Solicitor General has noted (U.S. Mem. at 3), the Special Master found that "the U.S. diligently investigated the violation alleged by Gravitt" through a joint criminal-civil investigation involving an audit by the Defense Contract Audit Agency, extensive interviews by the FBI, and a grand jury investigation. Pet. App. C at 16a-24a, 29a. Accordingly, the United States properly concluded that it had no need also to conduct civil discovery to determine the strength of its case. The district court thus has finally and irrevocably decided that the parties may not termi-

nate this litigation on the terms that they consider appropriate.

Gravitt's contention that the rejection of a settlement does not resolve an issue separate from the merits is predicated on his characterization of this Court's contrary determination in *Carson* as mere "*dicta*." Gravitt at 20. This Court in *Carson* said that courts properly "do not decide the merits of the case or resolve unsettled legal questions" in reviewing settlements. 450 U.S. at 88 n.14. The analysis provided in *Carson* may not be so disregarded, unless and until this Court itself concludes that it wishes to disavow it. Cf. *United States v. Mason*, 412 U.S. 391, 396 (1973). Moreover, as the United States correctly notes and Gravitt does not dispute, the question of the district court's authority to review the adequacy of the government's settlement is plainly unrelated to the merits of the case. U.S. Mem. at 7.

Finally, Gravitt's contention that the district court's order rejecting the settlement may be effectively reviewed after final judgment ignores this Court's contrary determination in *Carson*, 450 U.S. at 87-88, as well as the terms of the settlement. As the Solicitor General has explained, the settlement is intended to avoid litigation costs and lapses in the event that the case is forced to trial. U.S. Mem. at 5.¹

¹ Gravitt also suggests that the district court's order should be viewed as an "inherently tentative" discretionary determination that does not involve the kind of "important and unsettled question of controlling law" which Justice Scalia suggested is more appropriate for immediate appeal in his concurring opinion in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133, 1145 (1988). Gravitt at 17-18. Even if the Court were to add that additional limit to the standards for collateral finality under § 1291, this case would satisfy that restrictive standard. As the Solicitor General points out, the district court's order conclusively determined not only whether the settlement was fair and reasonable but also resolved the unsettled and controlling legal question of the court's authority to prevent the settlement and refuse to dismiss this

3. *Immediate Appellate Review Is Needed to Prevent Private Interlopers From Displacing the Department of Justice in the Prosecution of False Claims Act Cases.*

Gravitt argues that this case differs from *Carson* because, unlike *Carson*, not all of the "parties" have agreed to the settlement, just GE and the government. Gravitt at 8, 16 n.9. Thus, Gravitt proclaims that "the DOJ need not try the case" because he is "more than happy to prosecute this case on the government's behalf." Gravitt at 14. But this argument presumes that Gravitt enjoys authority to represent the United States in advancing its monetary claims and to object to the settlement negotiated and approved by the Department of Justice as the constitutionally exclusive representative of the interests of the United States. Both GE and the government challenge his legal right to usurp that responsibility. See U.S. Mem. at 2 n.1, 8. It is the responsibility of the Department of Justice to determine how best to enforce the law on behalf of the United States.

Unless the district court's order here is subject to immediate appeal, the order will effectively deprive the Department of Justice of its litigating discretion, as well as the benefit of a \$234,000 settlement, in an apparent effort to enable Gravitt to try an action that the Special Master, consistent with the Justice Department, found to be "highly unlikely to produce as satisfactory a result as . . . the proposed settlement." Pet. App. C at 28a. Indeed, the government determined that there is a substantial risk that a trial would lead to no recovery at all. The decision to take \$234,000 rather than take a gamble that might cost the government its entire claim belongs to the Justice Department, not a private interloper.

In an attempt to justify the district court's order and his role in this case, Gravitt suggests that the review

action, despite the decision of the Executive Branch to do so. U.S. Mem. at 5.

and rejection of the settlement were necessary to "prevent collusion" between the United States and GE that he alleges has produced a "sweetheart settlement" that is "improper." Gravitt at 13-14. But the Special Master, in findings that the district judge did not dispute, determined that there was no evidence of any such improper "collusion" and that GE "should not be criticized because it cooperated with the government—it should be congratulated for its attitude." Pet. App. C at 25a, 28a. Some courts have indicated that a prosecutor's decision to dismiss an action under Fed. R. Crim. P. 48(a) may be rejected "in extraordinary cases . . . when the prosecutor's actions clearly indicate a 'betrayal of the public interest.'" *United States v. Hamm*, 659 F.2d 624, 629 (5th Cir. 1981) (en banc). This Court should direct the court of appeals to determine whether, as in this case, bare and unsubstantiated allegations maligning the good faith of the Department of Justice will suffice to justify unreviewable judicial interference with the government's discretion to resolve its interests without years of further litigation.

CONCLUSION

(1) This case clearly presents an issue which this Court has reserved for decision.

(2) The Solicitor General agrees that the issue is of continuing importance.

(3) The issue is squarely presented in this case so that it is ripe for decision.

Certiorari should be granted.

Respectfully submitted,

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